No. 17-204

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and its progeny hold that the damages remedy in antitrust disputes belongs only to the immediate victims of the anticompetitive conduct ("direct purchasers"), and not to downstream parties claiming "pass-through" damages ("indirect purchasers"). In electronic marketplaces such as Apple's App Store at issue in this case, the marketplace sponsor interacts with and delivers goods "directly" to consumers, but as an agent on behalf of third parties—the app developers who price and sell their apps on the App Store. The district court dismissed this action under *Illinois Brick*, holding that consumer plaintiffs alleging monopolization of distribution services Apple provides to app developers were necessarily seeking pass-through damages. The Ninth Circuit reversed, holding—in an acknowledged split with the Eighth Circuit—that consumers can sue whoever delivers goods to them, even if they seek pass-through damages.

The question presented is: Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Apple Inc. is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

Respondents are Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell, all of whom purchased an iPhone and purchased an iPhone software application during the alleged class period. Respondents purport to represent a class of similarly situated persons in the United States who purchased an iPhone software application from December 29, 2007 to the present.

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OPINION BELOW

The decision below is reported at 846 F.3d 313 (9th Cir. 2017). Pet. App. 1a-22a. The order denying rehearing *en banc* is unpublished. *Id.* at 38a-39a. The district court's decision dismissing the second amended consolidated class action complaint is unpublished. *Id.* at 23a-37a.

JURISDICTION

The court below entered judgment on January 12, 2017, and denied a timely rehearing petition on May 4, 2017. Pet. App. 1a, 38a-39a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any "person . . . [to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

Ten years ago, Apple revolutionized software distribution by creating an electronic marketplace through which third-party software developers could distribute software applications ("apps") for Apple's then-new iPhone to all iPhone users. Apple called its new marketplace the App Store. The iPhone and App Store together were key drivers of the "smartphone revolution," as seamless access to millions of iPhone users drove an explosion of development and innovation in mobile apps. As this Court observed in another context, "[t]here are over a million apps available in each of the two major app stores; the phrase 'there's an app for that' is now part of the popular lexicon." *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). The App Store was also widely emulated so that, today, app stores are commonplace, distributing not only iOS apps for iPhones and iPads, but apps for Android devices, desktop and laptop application software, content for gaming platforms, and much more.

A putative class of iPhone users who purchased iPhone apps nevertheless claims that Apple illegally monopolized "the worldwide distribution market for iPhone applications." Pet. App. 41a (¶ 3). They complain that Apple requires all iOS apps to be approved and distributed by Apple alone, allowing Apple to charge excessive distribution commissions, which lead to higher app prices. Indeed, Apple does require iOS developers to submit iOS apps to Apple for review for malware and similar issues. Approved native iOS apps are then distributed solely through the App Store (otherwise developers could circumvent the approval process). And for paid apps (many are

free), Apple charges developers a 30% commission. However, the developer always independently sets its app prices. Apple does not set app prices for third-party developers. *See* U.S. Invitation Br. 2 ("Apple does not take ownership of third-party apps sold through the App Store, but instead acts as the developers' agent and completes the sales on their behalf.").

The threshold question is whether end-user consumers have standing to seek antitrust damages based on allegedly monopolistic commissions on app distribution—a service that iOS developers, not end-users, buy from Apple. The answer is found in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), where this Court interpreted Section 4 of the Clayton Act, 15 U.S.C. § 15(a), to mean that in alleged overcharge cases (such as this) the party who pays the alleged overcharge first and directly can sue for the whole amount, and other parties who are harmed only insofar as the first party passed on some or all of the claimed overcharge do not have a damages remedy.

The *Illinois Brick* doctrine, as it has become known, was grounded in part on common law principles favoring direct over indirect damages claims, in part on the Court's desire to avoid conflicting and duplicative damages, and in part on this Court's judgment that attempting to allocate overcharges among purchasers along a distribution chain is complex and would thus substantially raise the costs, and dampen the vigor, of antitrust enforcement. It was reaffirmed by this Court in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 204 (1990). And notwithstanding criticism and efforts to

have Congress overturn it, the *Illinois Brick* doctrine has endured as a staple of American antitrust law for four decades.

The district court understood *Illinois Brick* correctly. When Apple moved to dismiss, the district court focused on the right issue—whether Respondents' damages theory depends on developers passing through an overcharge to consumers. Respondents first tried obfuscating by refusing to say who sets app prices, even though the answer—that app developers do, and that Apple sells apps at exactly those prices—is common knowledge. But the district court insisted on clarity with respect to who sells exactly what to whom, and what that means for Respondents' damages theory. After two rounds of briefing and argument, the district court concluded that the complaint is fairly read to allege that developers pay Apple's commissions, developers set their app prices in light of those commissions, and therefore, to the extent that app prices are supracompetitive, that has to be because developers are passing-through an overcharge. The court properly held that overcharge theory is barred by *Illinois Brick*.

The Ninth Circuit reversed, holding that consumers can sue Apple for these commissions simply because Apple performs the marketplace "function" of a "distributor." Pet. App. 20a-21a. The dispositive functions were processing and fulfilling online app purchases. The Ninth Circuit held that it does not matter who is actually pricing the apps, whether a plaintiff's case depends on a pass-through theory of harm, or even whether the developers might have a cause of action to recover the exact same

commissions. *Id.* at 19a-21a. Identifying the "distributor" is all that matters.

The Ninth Circuit's decision is contrary to this Court's precedent and its underlying policy objectives. It elevates and makes dispositive economically insignificant facts, while going out if its way to say that the concerns about pass-through and duplicative recovery evident in each of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* do not matter. That leads to the outcome favored by the *dissent* in *Illinois Brick*, in which Justice Brennan argued that consumers should always have a damages remedy. *See Illinois Brick*, 431 U.S. at 761-65 (Brennan, J., dissenting). Indeed, the author of the Ninth Circuit opinion made clear at the opening of oral argument that he was "sympathetic" to Respondents' position because he "think[s] Justice Brennan got it right in *Illinois Brick*."[1] But that position did not prevail. Not in *Illinois Brick*, not in *UtiliCorp*, and not in countless cases in the lower courts that have readily understood that if a damages claim presents a pass-through issue and a threat of duplicative recovery, it is barred by *Illinois Brick*.

In this case, the pass-through issue is clear and unavoidable, and not the least bit lessened by Apple's role in selling and delivering apps to iPhone users. Respondents do not allege that Apple monopolized *apps*, but rather *distribution services*, an entirely different "upstream" product that consumers do not purchase at all. In that context, the transactional connection between Apple and app purchasers is not

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[1] CA9 Oral Argument at 4:20 (Feb. 10, 2016), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009059 (question from Judge Fletcher).

meaningful for the *Illinois Brick* issue. The Eighth Circuit understood this twenty years ago, holding that a direct transactional relationship with consumer-plaintiffs does not matter when the complaint is about alleged anticompetitive conduct *that first affects someone else* (concert venues in that case, app developers here), and the prices consumers pay are inflated, if at all, because of how those other parties react to the allegedly anticompetitive conduct. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171-72 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

And fundamentally, Respondents' argument disregards this Court's history of rejecting antitrust arguments based on "formalistic distinctions rather than actual market realities." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992). Pigeonholing Apple into some "distributor" box is empty formalism. The actual market reality of this case is that app prices are independently set by developers and will reflect any overcharge on distribution services only and to the extent that the developers choose to pass-through the allegedly supracompetitive distribution costs in their app prices. That is what matters to *Illinois Brick*, not how app orders are processed and fulfilled.

The Ninth Circuit's decision should be reversed, and the district court's dismissal reinstated.

STATEMENT OF THE CASE

This matter is before this Court after an appeal from a ruling on Apple's motion to dismiss. Consistent with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), we therefore assume the truth of all well-pleaded facts.

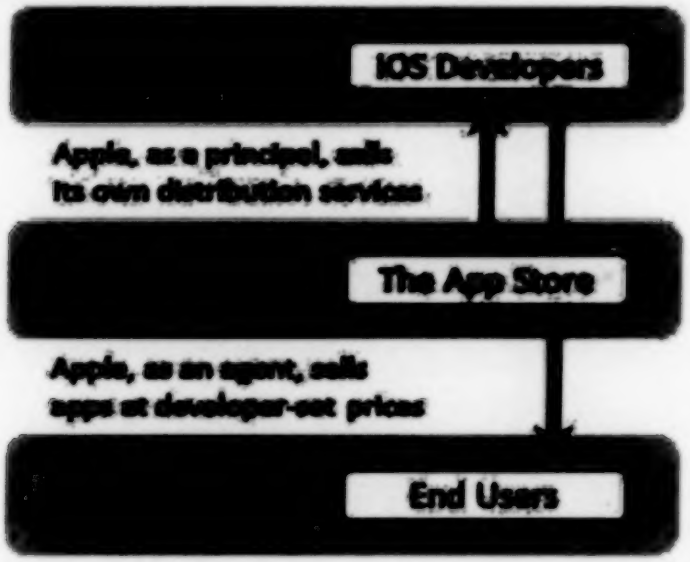
A. iPhone, Apps, And The App Store

In June 2007, Apple introduced the iPhone, the company's first cellular telephone product. Pet. App. 41a (¶ 2). The iPhone was a "novel," "revolutionary," and "breakthrough" product that "shifted the paradigm for smartphones, and . . . changed the entire cell phone manufacturing industry." *Id.* at 42a, 41a, 48a (¶¶ 7, 2, 26).

One of Apple's most substantial innovations associated with the iPhone involved add-on software applications—apps—that run natively on the iOS operating system. *Id.* at 49a (¶ 30). Apple designed, from the ground up, an ecosystem for the use, development, sale, and distribution of apps. That ecosystem has two relevant features: (1) iPhones will only download third party software that Apple has reviewed for malware and offensive content, among other things, and (2) to distribute those third party apps, Apple created a new kind of software distribution platform, the App Store. *Id.* at 49a, 51a (¶¶ 30-31, 37). The apps themselves, however, are created and developed by tens of thousands of registered iOS app developers; Apple itself develops only a handful.

The history of the App Store began in March 2008, when Apple released a "software development kit" for third-party developers to create approved apps for the iPhone. *Id.* at 41a, 51a-52a (¶¶ 2, 38-40). A few months later, in July 2008, Apple launched the App Store, the world's first electronic marketplace for developers to offer and distribute mobile phone apps. *Id.* at 51a (¶ 39). Apple structured the App Store as an agency-based, two-sided marketplace for

connecting developers and consumers, as depicted below:[2]


iOS Developers
Apple, as a principal, sells its own distribution services
The App Store
Apple, as an agent, sells apps at developer-set prices
End Users

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[2] The graphic illustrates allegations found in Respondents' Complaint, *inter alia*, at Pet. App. 49a-52a (¶¶ 30, 32, 37-41). Respondents have also stated in briefing that "Apple's App Store functions like a virtual consignment store," in that "[r]ather than following the traditional wholesale-retail merchandising model and buying apps from the developers and reselling the apps to customers at a profit, Apple places the developers' apps on the virtual shelves of its App Store, sells them directly to iPhone customers, charges and collects the full price (including its own 30% fee) from customers, keeps its 30% fee from every sale or license, and then remits the balance of the purchase price to the developer." *See* Pepper CA9 Br. 9. That is correct save for the reference to "consignment" (a specific type of agency relationship that includes a bailment and a different settlement flow). The graphic captures the important point—the agent/principal nature of the relationship between Apple and app developers.

Apple provides a variety of services to developers, including reviewing apps for safety and compatibility, hosting the App Store, acting as the developers' sales and delivery agent, collecting the purchase price (if any) from consumers on the developers' behalf, and remitting proceeds to developers from around the world. And as much or more important than any of this, Apple connects the developers to every one of the many tens of millions of iPhone (and iPad) users worldwide. In return, developers agree to pay Apple an annual $99 membership fee, and a 30% commission on their sales revenue from paid apps and in-app purchases. *Id.* at 51a-52a (¶¶ 38, 41).[3] App developers alone decide whether to charge for an app or its content and, if so, the price (ending in 99 cents) that consumers must pay.

Apple's innovations regarding the iPhone, iOS operating system, and App Store created a dynamic new industry where none had existed before. The App Store launched with 500 apps.[4] Respondents acknowledge that as of 2012, just four years into its existence, the App Store "offer[ed] more than 850,000 apps" (Pet. App. 43a (¶ 9)); today, there are over *2 million* apps offered through the App Store. Apple remitted $26.5 billion to iOS developers last year

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[3] The operative complaint mentions only paid apps in the sense that there is an up-front price to acquire the app. Many apps are initially free, but the developer offers additional content that consumers may acquire through in-app purchases. Apple's commission structure also has additional nuances that we ignore because they were not pleaded, *e.g.*, lower commission rates on subscriptions.

[4] *See* Press Release, *The App Store turns 10* (July 5, 2018), https://nr.apple.com/dE4w5d2A2Y.

alone.[5] The App Store has been so successful in facilitating app development that some commentators argue it was as much or more important than the iPhone itself to the way that smartphones changed our daily lives.[6]

Respondents, who are consumers of paid third-party iOS apps, nevertheless contend that Apple violated the antitrust laws by adopting a "closed" distribution system for iPhone apps, which they say allows Apple to charge an allegedly excessive 30% commission. Pet. App. 41a-43a, 45a, 49a, 51a-52a, 54a-55a (¶¶ 4, 6-8, 14, 30-31, 40-41, 48, 50). They advance two claims under § 2 of the Sherman Act—for monopolization and attempted monopolization of

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[5] Apple periodically reports these payments. *See* Press Release, *Apple Store kicks off 2018 with record-breaking holiday season* (Jan. 4, 2018), https://nr.apple.com/dE3h2n8x2O; *The App Store turns 10* (July 5, 2018), https://nr.apple.com/dE4w5d2A2Y.

[6] The recent tenth anniversary of the App Store generated numerous retrospectives on its revolutionary effects. *See, e.g.*, Michael Leidtke, *How Apple's App Store Changed Our World*, U.S. News & World Report (July 10, 2018), https://www.usnews.com/news/business/articles/2018-07-10/how-apples-app-store-changed-our-world; Andreas Goeldi, *The Smartphone Revolution: Why the App Store Was More Important Than the iPhone*, Innospective (June 21, 2018), https://innospective.net/the-smartphone-revolution-why-the-app-store-was-more-important-than-the-iphone/ ("Most people think of the first iPhone as the product that triggered the smartphone revolution. . . . I would argue that *the really transformational product was another one of Apple's innovations: The iPhone app store.*").

a supposed "aftermarket" limited to distribution services for iPhone apps. *Id.* at 60a-62a (¶¶ 70-80).[7]

B. District Court Proceedings

The procedural history of this case is convoluted. It originated as the second of three putative class actions filed by the same plaintiffs' counsel alleging that Apple violated the antitrust laws by imposing certain limitations on the iPhone. The first and third cases asserted the theory that Apple had unlawfully granted AT&T Mobility ("ATTM") a "monopoly" over voice and data cellular service for the iPhone by agreeing to let ATTM be the exclusive service provider for the iPhone in the first few years following its launch. *See In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1294-96 (N.D. Cal. 2008); Complaint ¶¶ 44-54, *Ward v. Apple Inc.*, No. 12-cv-5404-YGR (N.D. Cal. Oct. 19, 2012), ECF No. 1. This case, in its current iteration, focuses solely on native iOS apps and Apple's decision that they would be curated by Apple and sold and delivered exclusively through the App Store. Pet. App. 41a-43a, 45a, 51a-52a, 54a-55a (¶¶ 4, 6-8, 14, 40-41, 48, 50).

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[7] Apple accepts that the antitrust merits are not the focus of this proceeding. Still, Respondents' allegation that the iOS app ecosystem is "closed" and anticompetitive is manifestly untrue. The iPhone and Apple's curated App Store distribution model resulted in one of the greatest explosions of output in history. And it makes no sense to call a marketplace in which tens of thousands of iOS developers are offering over 2 million apps "closed." *See generally* Slinger Jansen & Ewoud Bloemendal, *Defining App Stores: The Role of Curated Marketplaces in Software Ecosystems* (manuscript), https://pdfs.semanticscholar.org/ec26/1e70056f825883f208533b95eb432c582a94.pdf (last visited Aug. 1, 2018).

Apple initially moved to dismiss the complaint under *Illinois Brick*, on the basis that plaintiffs had not alleged and could not allege anything other than a pass-through injury. The motion was grounded in a then-recent Ninth Circuit decision holding, on the one hand, that "*Illinois Brick* rejected . . . 'mark up' claims," even if the plaintiff and defendant transacted business directly, but leaving open the possibility of antitrust standing for parties who paid an unlawfully "fixed fee" to one of the parties who fixed it. *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 753 (9th Cir. 2012) ("*ATM Fee*"), *cert. denied*, 571 U.S. 944 (2013).[8] Apple's motion therefore crystallized into a dispute over who sets the price consumers pay, whether there was a developer mark up, and if so how it is related to Apple's commission.

Plaintiffs repeatedly argued that Apple adds a 30% charge *on top* of the app price set by the developer, such that there was no developer "mark up," but rather a case where the "Plaintiffs paid the alleged unlawful price – here Apple's 30% fee – directly to Apple." JA72-73; *see also* JA75-76, 129, 130-31. But they would never explicitly allege in any complaint that Apple sets app prices or adds anything to the prices developers set.[9] They could not, since it

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[8] The Ninth Circuit's decision in *ATM Fee* affirmed *In re ATM Fee Antitrust Litigation*, No. C 04-002676-CRB, 2010 WL 3701912 (N.D. Cal. Sept. 16, 2010) (Breyer, J.). Both Judge Breyer and the Ninth Circuit concluded that the *ATM Fee* plaintiffs were not paying an illegally fixed fee, but a different and derivative fee that would harm plaintiffs only because of pass-through.

[9] As a matter of economics the two are not the same. While the pass-through issue might indeed go away if Apple had *carte*

is common knowledge—reflected in many thousands of iOS developer agreements—that developers set their app prices, with knowledge that they would pay Apple a 30% commission from the purchase price. A brief overview of how the district court sought clarity on this issue is illuminating.

In its August 15, 2013 decision granting Apple's initial motion to dismiss, the district court noted that, notwithstanding the importance of pass through to an *Illinois Brick* analysis, "[n]owhere do Plaintiffs explain how Apple's conduct results in increased 'prices' or how said prices were paid." JA113-14. The court recognized that while Respondents had argued *in briefing* that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps," *id.* at 114 (citation omitted), their complaint "does not provide that the [complained-of] fee is paid 'on top of' the cost of" the App, but rather that "'Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%.'" *Id.* at 114 n.14 (citation omitted). Given that ambiguity, the district court gave Respondents an opportunity to amend their complaint "to address antitrust standing and *Illinois Brick*." *Id.* at 114.

In response, Respondents filed the operative complaint, which alleges *inter alia* that (i) "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple a share of third party's sales proceeds," (ii) "the full purchase price[] includ[es] Apple's 30% commission," which is paid

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blanche authority to set app prices, it exists whenever developers set prices—irrespective of whether the allegedly supracompetitive commission rate is added to or subtracted from the developer's price.

directly to Apple, and (iii) "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." Pet. App. 49a-50a, 52a (¶¶ 32, 41).

Apple filed a renewed motion to dismiss, based largely on these admissions and Respondents' failure to allege that Apple adds a fee—any fee—to the price set by developers for their apps. JA122-23. Apple explained that Respondents' allegations "studiously avoid a simple declarative sentence that Apple takes a price that has been established by the developer and adds 30% (or anything) to that," even though the district court had been crystal clear that the distinction was important to its consideration. *Id.* at 124.

At the motion to dismiss hearing, the district court addressed this issue: "I indicated some very specific information that I thought was necessary to allege" and "a number of those questions still weren't answer[ed], and perhaps it's because [Respondents] don't want to answer them." *Id.* at 137-38. When pressed further by the district court about who sets the price consumers pay, Respondents ultimately admitted that: "If Apple tells the developer, who thinks it needs 99 cents to turn a reasonable profit, that we're going to charge 30 percent of your price, . . . then the developer knows that's going to be getting 66 cents instead of 99 cents to . . . make a profit . . . . So what's the developer going to do? The developer is going to increase its price to cover Apple's . . . demanded profit." *Id.* at 143.

That was clear enough. The district court granted Apple's renewed motion to dismiss, writing that "the [Second Amended Complaint] is fairly read to complain about a fee created by agreement and borne

by the developers to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of the purchase price." Pet. App. 36a. The district court further stated that "[d]espite the Court's instruction to do so if they could, Plaintiffs do not allege in the SAC any price 'fixed' by Apple." *Id.* Rather, "the 30% figure for which Plaintiffs complain is . . . a cost passed-on to consumers by independent software developers," such that "any injury to Plaintiffs is an indirect effect resulting from the software developers' own costs." *Id.* at 37a.

C. The Ninth Circuit's Decision

The Ninth Circuit reversed. Pet. App. 22a.

The Ninth Circuit's decision contains no discussion of whether Respondents were injured directly or indirectly, or whether they were the first purchaser or an "indirect" purchaser of the relevant product. It contains no discussion of whether Respondents' damages claim depends on a "pass-through" theory of harm raising the issues of apportionment and double recovery that concerned this Court in *Illinois Brick* and *Hanover Shoe*. Nor does it so much as cite the Ninth Circuit's own *ATM Fee* decision, which followed and applied *Illinois Brick* faithfully. Instead, the panel asserted that "[t]he key to the analysis is the function Apple serves." *Id.* at 20a-21a. The panel held that there is a "fundamental distinction between a manufacturer or producer, on the one hand, and a distributor on the other," that the "distributor" is the party "who 'supplies the product directly to' plaintiffs," and that consumers always have standing to sue a distributor, no matter what. *Id.* at 19a-21a (citation omitted). Under this "bright line" approach, the panel reasoned that because Apple sells and delivers apps to the consumer it acts as a

"distributor," and therefore consumers must be direct purchasers and entitled to sue Apple for damages—regardless of the actual commercial arrangements, or the actual theory of harm. *Id.* at 21a.

The Ninth Circuit explained in some detail what, in its view, *did not* matter. The fact that "Apple does not take ownership of the apps and then sell them to buyers after adding a markup" was unimportant because "the distinction between a markup and a [sales] commission is immaterial. . . . The key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." *Id.* at 20a-21a.

The Ninth Circuit also emphasized that it "d[id] [not] rest [its] analysis on who determines the ultimate price paid by the buyer of an iPhone app." *Id.* at 21a. Indeed, the Ninth Circuit's indifference to that issue led it to be careless about the record. It stated correctly that "the price is determined as a practical matter by the app developer," but incorrectly that "Apple's thirty percent commission is added automatically" to that price—which is factually and mathematically wrong (it is subtracted from a developer-set price) and exactly the point the district court worked so diligently and successfully to clarify. *Id.* And "who determines the ultimate price" is not something to be careless about, since if developers are setting app prices, those prices would only increase through developer pass-through decisions. *Id.*

The Ninth Circuit also held that "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Id.* at 20a. This was despite the panel's recognition that an affirmative answer to that question "would

necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple" for the same commissions Respondents challenge here. *Id.* The panel thus opened the door to duplicative recoveries for the exact same commission (trebled each time) by different plaintiff groups under different characterizations of the same transaction.

The Ninth Circuit acknowledged that its decision created a circuit split with the Eighth Circuit's decision in *Campos*. *See id.* at 19a ("We disagree with the majority's analysis in *Ticketmaster*.").

Apple sought rehearing *en banc*, but the court of appeals denied the petition without opinion. *Id.* at 38a-39a. This Court called for the views of the Solicitor General, who advised that the Ninth Circuit's decision is inconsistent with this Court's precedent and merits review. This Court granted certiorari.

SUMMARY OF ARGUMENT

In *Hanover Shoe* and *Illinois Brick*, this Court resolved longstanding confusion and practical difficulties in federal antitrust litigation by interpreting Section 4 of the Clayton Act to embrace two complementary principles. The first party that directly pays an alleged overcharge has a complete and undiluted cause of action for the entire overcharge. No one, however, can sue to recover "pass through" injuries. Those holdings are grounded in common law principles about directness of injury and avoiding duplicative recoveries, this Court's judgment that concentrating the antitrust cause of action in the most efficient enforcer promotes optimal enforcement, and this Court's strong desire to save antitrust

litigation from the costs and complexity of apportioning overcharge claims among competing plaintiffs. *See generally* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602 (1979).

The damages cause of action asserted by Respondents is contrary to that settled law. It depends on precisely the sort of "pass through" theory of harm that *Illinois Brick* is designed to prohibit. In fact, it depends on conducting a prohibited pass-through analysis millions of times, because the required economic analysis must be undertaken app-by-app and Respondents have styled their claim as a class action covering all United States purchasers of all iPhone apps.

Permitting Respondents' damages action also invites duplicative recoveries. The Ninth Circuit's decision is openly indifferent to the prospect that both consumers and iOS developers would seek treble damages from Apple for the same alleged overcharge. That is irreconcilable with this Court's doctrine. *Illinois Brick* refused "to 'open the door to duplicative recoveries' under § 4," 431 U.S. at 731 (citation omitted), and *UtiliCorp* reaffirmed that principle, 497 U.S. at 212-13.

Respondents' damages claim also depends on a deliberate indifference to the context of Apple's "direct" sales of apps to consumers and their own theory of antitrust injury. It is true that Apple sells and delivers apps to consumers—which to the Ninth Circuit is all that matters. But this is a case about the alleged monopolization of *app distribution*, not apps. Respondents' theory is that Apple is charging

developers too much for app distribution, causing *the developers* to raise app prices. Furthermore, as Respondents have themselves noted, *see* Pepper CA9 Br. 9, Apple sells those apps at precisely the prices developers have set. In that context, Apple's sales and fulfillment functions are irrelevant to the *Illinois Brick* analysis: the allegedly higher app prices are necessarily the result of developer pass-through decisions, which bars Respondents' damages claims.

The Ninth Circuit ignored all of this. It set out to replicate the outcome favored by the dissent in *Illinois Brick*, but with a peculiar logic that finds no support in this Court's decisions (or even Justice Brennan's dissent). Instead of pass-through and the threat of duplicative recoveries, the Ninth Circuit held that "[t]he key to the analysis is the function Apple serves"—specifically, whether it is a distributor. Pet. App. 20a-21a. But that is immaterial to this Court's doctrine. The *Illinois Brick* rule is about pricing dynamics and specifically the difficulty of trying to figure out how the party that first bears an overcharge will adjust its pricing to pass some or all of it on to the next level of the market. Who processes the sale, collects the purchase price, and delivers the goods makes no difference at all.

The Ninth Circuit's "distributor function" rule is *especially* wrong in the case of agency-based electronic marketplaces like the App Store. Even if there were some principled, economic basis for focusing on distribution functions to the exclusion of all else—and there is not—it cannot apply to sales agents who follow their principals' instructions as to what price to charge. *See generally United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926) (rejecting claim that a principal and agent could conspire to fix prices,

since the agent was obligated to charge prices set by its principal). In this increasingly important business model for electronic commerce, looking away from the pricing decision and only toward who takes the order and delivers the goods will lead to the wrong answer every time.

ARGUMENT

I. A STRAIGHTFORWARD APPLICATION OF *ILLINOIS BRICK* BARS RESPONDENTS' DAMAGES CLAIM

A. Under *Illinois Brick* And *Hanover Shoe*, The Party First And Directly Injured By An Alleged Overcharge Has The Entire Damages Claim

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). This Court's long-standing precedent in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its predecessor, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), have construed this language to consolidate the damages cause of action in one party (or set of like parties) and prohibit the use of pass-on theories by both plaintiffs and defendants.

In *Hanover Shoe*, this Court held that an antitrust defendant cannot lessen its exposure to damages with a pass-through *defense*, *i.e.*, it cannot say that the plaintiff suffered no loss or less loss because it had passed on an overcharge, in whole or in part, to its own customers. 392 U.S. at 489, 492. Rather, the Court held that a plaintiff who purchased goods or

services at an inflated price as a result of anticompetitive conduct by a supplier has suffered damage in the *full amount* of the overcharge. *Id.* at 487-91.

Justice White's opinion relied on a variety of early overcharge cases for the proposition that "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" and inquire into "the possibility that plaintiffs had recouped the overcharges from their customers.'" *Id.* at 490 & n.8 (quoting *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). But in addition, the Court held that "[t]reble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness" if pass-on defenses were permitted. *Id.* at 494. Since "[a] wide range of factors influence a company's pricing policies," allowing even a limited pass-on defense would inevitably lead to "complicated proceedings involving massive evidence and complicated theories"—seriously threatening the vitality and practicality of antitrust enforcement. *Id.* at 492-93.

In *Illinois Brick*, this Court addressed the other side of the same coin—whether an indirect purchaser, who bears an overcharge only to the extent that it was passed on by a direct purchaser, can sue for damages. 431 U.S. at 724. The Court began by declining invitations to reconsider its holding nine years earlier in *Hanover Shoe*, "bear[ing] in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Id.* at 736. The Court then explained in detail that all of the reasons for its *Hanover Shoe*

holding also supported a parallel rule that plaintiffs cannot introduce pass through and apportionment issues *offensively*. Allowing pass-on theories of injury under Section 4 "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge" and "seriously undermine the[] effectiveness" of the antitrust laws. *Id.* at 737-38. In this Court's view, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 734-35.[10]

The Court also emphasized that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." *Id.* at 730. "Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on . . . ." *Id.* The Court rejected the argument that "a little slopover on the shoulders of the wrongdoers . . . is acceptable." *Id.* at 731 n.11

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[10] This is the origin of what has become known as the "efficient enforcer" element of antitrust standing—the idea that that antitrust enforcement is optimized when the right to seek damages is given to the category of plaintiffs likely to be the most efficient enforcers of the antitrust laws. *See* Landes & Posner, 46 U. Chi. L. Rev. at 609 ("The direct purchaser is a more efficient enforcer of the antitrust laws than the indirect purchaser because of the former's closer proximity to the violator.").

(alteration in original) (citation omitted). To the contrary, quoting *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972), the Court was "unwilling to 'open the door to duplicative recoveries' under § 4." 431 U.S. at 731.

Justice Brennan dissented, arguing as a matter of statutory construction that Congress intended for consumers to always have a damages claim. In particular, the dissent perceived from then-recent legislation allowing *parens patriae* actions by States on behalf of their citizens that Congress must have favored consumer class actions generally, irrespective of whether they presented pass-through issues. *Id.* at 765 n.24 (Brennan, J., dissenting). The *Illinois Brick* majority rejected this argument. *Id.* at 733 n.14. The dissent also argued that apportioning an overcharge among various parties within a distribution chain is no more difficult than other challenges in antitrust litigation. *See id.* at 758-59 & n.14. The majority disagreed with that too, adding: "In any event, as we understand the dissenters' argument, it reduces to the proposition that because antitrust cases are already complicated there is little harm in making them more so. We disagree." *Id.* at 743 n.27.

The Court reaffirmed its *Illinois Brick* analysis in *UtiliCorp*, which addressed who may sue "when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers." 497 U.S. at 204. Two states, suing as *parens patriae* on behalf of consumers and state agencies that purchased natural gas from the defendant utility, argued that indirect purchaser suits should be allowed "in cases involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208. The Court

disagreed, reasoning that there was a pass-through issue even on these facts, and it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick* simply because some cases are easier than others. *Id.* at 217. "Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4." *Id.*[11]

The rule derived from these precedents is that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the [Clayton Act]." *Illinois Brick*, 431 U.S. at 729.

B. Respondents' Claim Depends On A Prohibited Pass-Through Theory Of Harm

Respondents' theory of harm presents the pass-through problem that *Illinois Brick* is designed to avoid. Respondents complain that the 30% commission that Apple charges app developers is excessive, and causes developers to set higher prices for their apps to consumers than they otherwise would. *See* Pet. App. 43a, 52a (¶¶ 8, 41). The district court explained that Apple's commission is first "borne *by the developers*" and then allegedly "passed-

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[11] Notably, even Justice White's dissent agreed "it would unduly complicate litigation to require courts to separate the portion of the overcharge absorbed by the direct purchaser from the portion of the overcharge passed onto the indirect purchaser." *UtiliCorp*, 497 U.S. at 223 (White, J., dissenting). Justice White dissented in *UtiliCorp*—after authoring the Court's opinion in *Hanover Shoe*—strictly because he did not believe that pass-through issues arose *at all* in the case of regulated utility rates. *Id.* at 224.

on to the consumers as part of the purchase price" the developers set. *Id.* at 36a. Respondents likewise acknowledge that any higher app prices result from decisions by developers to "mark-up the price [of their apps]" in order to recover some or all of Apple's commission. Pepper CA9 Br. 35 n.10. As the United States explained, the extent of any injury to app purchasers thus "depends on whether [the challenged] Apple practices have caused developers to increase the prices charged for their apps in the App Store," and "[t]o determine whether third-party app developers would have charged lower prices in a hypothetical market in which they were freed from Apple's allegedly unlawful practices, a court would need to conduct precisely the sort of pass-on analysis that the Court in *Illinois Brick* rejected." U.S. Invitation Br. 14.

Under this Court's precedents, that ends the inquiry. It does not matter whether the pass-through issues are relatively easy or complex. *See Illinois Brick*, 431 U.S. at 744-45 (rejecting efforts to "classify[] various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum"); *UtiliCorp*, 497 U.S. at 217 (litigating exceptions to *Illinois Brick* is "unwarranted and counterproductive"). Nevertheless, to underscore how much of the economic substance of this case was "written out of the script" by the Ninth Circuit's erroneous reasoning, it is worth pausing a moment to consider the unusual complexity of the pass-through issues here.

Damages in indirect purchaser actions depend on "the pass-through rate"—the extent to which a firm increases its price due to a marginal increase in cost,

including that from an overcharge. Simplistically, the pass-through rate depends on the degree to which demand and supply conditions allow the direct purchaser to profitably raise downstream prices. *See Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 852 F.2d 891, 894 (7th Cir.) (Posner, J.) ("A direct purchaser who finds himself paying a higher price for inputs would love to pass on all of the additional cost to his customers in the form of a higher price, but [often] he cannot do so, because a price that much higher will so reduce the demand for his product that his profits will fall unacceptably."), *cert. denied*, 488 U.S. 986 (1988).

More technically, the pass-through rate depends (among other things) on the slope and shape of the demand and supply curves the seller faces and the resulting elasticities. "The steeper (less elastic) the demand curve or the flatter (more elastic) the supply curve, the more of the tax or cost increase that will be borne by the next level of the distribution chain." Chris S. Coutroulis & D. Matthew Allen, *The pass-on problem in indirect purchaser class litigation*, 44 Antitrust Bull. 179, 197-98 (1999); *see also Illinois Brick*, 431 U.S. at 741 (explaining how, "[u]nder an array of simplifying assumptions," economic theory predicts the pass-through rate based on "the ratio of the elasticities of supply and demand in the market for the passer's product").

The starting point for any pass-through analysis is therefore the "serious problem of measuring the relevant elasticities." *Illinois Brick*, 431 U.S. at 742. In practice these values are never known; they are instead estimated econometrically—and litigated vigorously. Indirect purchaser plaintiffs invariably take the position that the direct purchasers face

demand conditions that allow for robust pass-through (sometimes greater than 100 percent). Defendants ordinarily contest that. Complex "battles of the experts" ensue.

The exceptional feature of this case is that there are millions of apps sold—and priced—by tens of thousands of iOS developers. As noted, the operative complaint, drafted in 2012, alleges that "Apple now offers more than 850,000 apps, and iPhone consumers worldwide have downloaded apps more than 50 billion times since July 2008." Pet. App. 43a (¶ 9). The numbers are much higher today. These apps perform thousands of different functions, in competition with countless different potential substitutes—including other apps but often also other software (like desktop applications), physical devices such as calculators, guitar tuners, or game systems, and numerous publications. That means that demand and supply elasticities would need to be estimated in this case on a scale never before imagined, let alone undertaken. *See* Coutroulis, 44 Antitrust Bull. at 198 ("In indirect purchaser litigation, [estimating the relevant supply and demand elasticities] will be necessary for each relevant product and geographic market, at each level of the distribution chain."). Respondents, after all, seek to represent "[a]ll persons in the United States . . . who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present." Pet. App. 57a (¶ 54) (emphasis omitted). They claim overcharges from each and every app sale, regardless of whether the app is a game like Minecraft or Fortnite, a business productivity app like Microsoft Word, a health app like Full Fitness

Workout, a music subscription app like Pandora, or a photo-editing app like Lightroom (to highlight just a few of the obvious distinctions).

In earlier, related litigation, Respondents took the position that this analysis could be done once—on the theory that the natural and competitive price for app distribution should be zero, and therefore the consumer overcharge on all apps is exactly equal to Apple's commission. That is wrong on multiple levels. Global distribution through a curated app store would never be free. It is costly to provide, indisputably valuable, and competing platforms such as Google Play have similar if not identical commission structures. But even assuming, however implausibly, that the competitive price for distribution services should be zero, that simply means that the amount of the initial overcharge to the developer, the direct purchaser, is the full commission, *e.g.*, 30 cents per app in the case of $0.99 apps, $2.10 per app in the case of $6.99 apps and so on. It still leaves open the question of how much of that alleged overcharge would be passed on to consumers. And that is when the differing supply and demand conditions (and other considerations) affecting the developers come into play. Developers facing intense competition and highly elastic demand would absorb most of the overcharge. Those with market power and inelastic demand would pass most of it to consumers. And it is senseless to approach this case as if Mojang, the developer of Minecraft (currently the best-selling paid app), would make the same pass-through decision as Rockstar Games would for Grand Theft Auto, Fifth Star Labs LLC would for Sky Guide, and the *New York Times* would for content subscriptions. The unavoidable reality is that the many thousands of

developers affected would each solve for their competition, their supply and demand conditions, their costs, their business model options, and their risk tolerance—and their pass-through and pricing decisions would be as unique as fingerprints.

Developers would also make different decisions about their fundamental monetization strategy for a given app. They could, for example, shift away from up-front payments (*e.g.*, $3.99 for the app) to free apps with later in-app purchase opportunities, as to which there may be less elastic demand. Finally, it cannot be forgotten that each consumer buys a unique set of apps—the ones they choose to buy—implicating a unique set of developer pass-through decisions that would need to be reflected in any damages estimates. The complications are endless, making the Ninth Circuit's refusal even to acknowledge the pass-through issues all the more troubling.

In *UtiliCorp*, this Court adopted a zero-tolerance approach to pass-through damages. 497 U.S. at 208-12.[12] That is the right approach. The daunting pass-

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[12] The exceptions to *Illinois Brick* for cost-plus contracts, 431 U.S. at 736, 745, and where the intermediary between the plaintiff and defendant is controlled by the defendant, *e.g.*, *Jewish Hosp. Ass'n v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 975 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), are situations in which there is no need to calculate a pass through. *UtiliCorp* addressed the cost-plus contract exception, holding that it would apply "only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury." 497 U.S. at 218. And the control exception recognized, to date, only in the lower courts, applies only when there is such unity between the first and second seller that there effectively has been only one sale. *Jewish Hosp. Ass'n*, 628 F.2d at 975.

through issues presented here make for an easy case, plainly barred by *Illinois Brick*.

C. If Respondents Were Allowed To Seek Damages, Apple Would Face Duplicative Damages Claims

Next to the challenges of apportioning overcharges and calculating pass-through rates, the most important consideration in an *Illinois Brick* analysis is the potential for duplicative recoveries. This Court and the lower courts have been emphatic about this. *Illinois Brick* refused "to 'open the door to duplicative recoveries' under § 4," 431 U.S. at 731 (citation omitted); *UtiliCorp* reaffirmed that principle, 497 U.S. at 212-13; and lower court cases accepting and applying this principle are legion. *See, e.g.*, *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1285 (11th Cir. 2014) (noting a purpose of the rule is to "eliminate[] the possibility that direct and indirect purchasers could seek duplicative recoveries against the antitrust violator"); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 (3d Cir. 1983) ("[T]he scope of *Illinois Brick*'s rule barring treble damage actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery . . . ."), *cert. denied*, 465 U.S. 1024 (1984); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30 (D.C. Cir. 1987) (recognizing that under *Illinois Brick* "multiple recovery should be avoided" and thus "allowance of indirect purchaser suits would compel apportionment of the recovery"), *cert. denied*, 485 U.S. 961 (1988); *Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012) (reasoning that in addition to a retail purchaser, "[t]he fact that [an electric utility] would

be a proper plaintiff to sue [a wholesale electricity producer] for the same conduct implicates *Illinois Brick*'s concerns about duplicative recovery"), *cert. denied*, 569 U.S. 947 (2013); *Cohen v. Gen. Motors Corp. (In re New Motor Vehicles Canadian Exp. Antitrust Litig.)*, 533 F.3d 1, 5 (1st Cir. 2008) (holding that permitting car lessees to sue car manufacturers for conspiring to prevent lower priced Canadian cars from entering the U.S. market would "risk duplicative recovery" as car dealers could also "initiat[e] their own suit").

There is no doubt that the risk of duplicative recoveries exists here—the Ninth Circuit itself said so and, inexplicably, held that it did not matter. The threat comes from the fact that iOS developers who pay the allegedly monopolistic commission could sue. Apple urged the Ninth Circuit to account for this possibility, drawing this response:

> We do not address the question whether Apple sells distribution services to app developers within the meaning of *Illinois Brick*. If it did, this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple. But whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us.

Pet. App. 20a.

This is error. The prospect of duplicative recovery cannot "make[] no difference." In addition to saying, repeatedly, that it does, this Court has stuck to that

position even though it means that some deserving plaintiffs are uncompensated. *See Illinois Brick*, 431 U.S. at 731 n.11 ("[P]roponents of [indirect purchaser actions] ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. . . . We do not find this risk acceptable."). Determining the "direct purchaser" is therefore necessarily an endeavor to find *one* appropriate plaintiff group among the categories of possible plaintiffs, thus *eliminating* any potential risk of duplicative recoveries. Here, that is plainly the iOS developers—the direct purchasers and "consumers" of the allegedly monopolized distribution services, and the group that meets all of the relevant "efficient enforcer" criteria.[13] The Ninth Circuit's express

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[13] Respondents suggest that developers may be afraid to sue Apple, but this is both irrelevant and highly unlikely. This Court has never recognized an exception to *Illinois Brick* that would invite courts to speculate about whether the actual direct purchaser was likely to sue. To the contrary, this Court has consistently rejected arguments that *Illinois Brick* dampens antitrust enforcement by putting the cause of action in the wrong hands. *See Illinois Brick*, 431 U.S. at 746; *UtiliCorp*, 497 U.S. at 214 (rejecting the argument that the direct purchasing utilities "lack the incentive to prosecute § 4 cases").

In all events, as Landes & Posner have observed, "the idea that purchasers are bashful about suing their suppliers is today unrealistic, almost quaint. Firms now bring antitrust suits at the drop of a hat—and are subject to severe criticism, and potentially to shareholders' derivative actions, if they forgo an opportunity to bring a meritorious suit." 46 U. Chi. L. Rev. at 614. It is also significant that among the tens of thousands of firms and individuals that have become registered iOS developers, and thus subject to the allegedly monopolistic behavior, are industry giants like Google, Microsoft, Hewlett-

indifference to how this suit duplicates and conflicts with potential developer claims is its ultimate repudiation of this Court's doctrine.

Respondents argue that duplicative recoveries are not a concern in this case because were iOS developers to sue, both the consumer and developer plaintiff groups would be fighting for "a piece of the same 30% pie." BIO 12. What this apparently means is that both consumers and developers would agree that the entire 30% commission is an overcharge, and then they would agree that the sum of their damages claim would not exceed the full commission. But why should anyone expect that to happen? The duplicative recovery concern is based on the rational assumption that different plaintiff groups will "assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain." *Illinois Brick*, 431 U.S. at 737. There is no mechanism for forcing plaintiffs groups to agree on anything, let alone on constraining their claims so as to avoid duplicative recoveries. And in all events, *Illinois Brick* specifically addressed the argument that through "procedural devices" courts might constrain duplicative recoveries—and rejected it because of "the complexity thereby introduced into treble-damages proceeding." *Id.* at 731 n.11.

Packard, and Electronic Arts, as well as companies whose entire livelihood comes from selling, or creating relationships through, mobile apps, *e.g.*, companies like Rovio (Angry Birds), King Games (Candy Crush Saga), and so on. It is implausible that no one in this wide range of sophisticated companies has the ability and wherewithal to sue Apple, if they truly felt wronged.

The obvious and acknowledged threat of duplicative recoveries in this case bars Respondents' damages claims.

II. PURCHASING APPS THROUGH THE APP STORE DOES NOT MAKE CONSUMERS DIRECT PURCHASERS OF APP DISTRIBUTION SERVICES

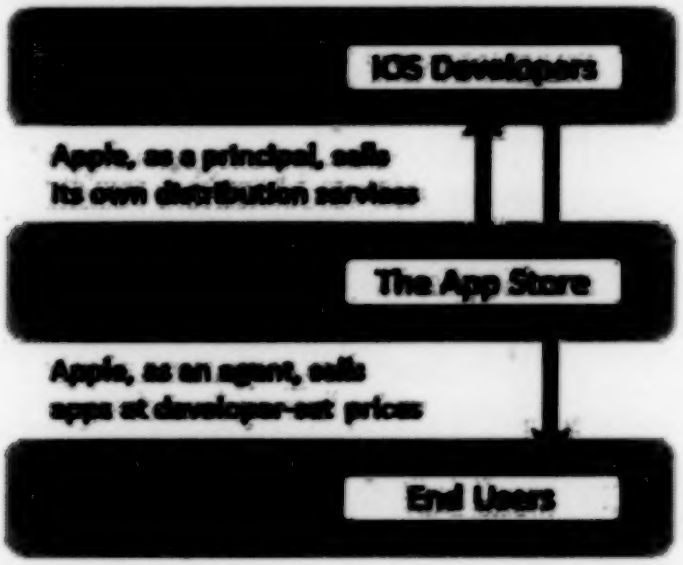
Respondents' case ignores pass-through and duplicative recovery concerns. Instead, it begins and ends with their allegation that Apple distributes apps "directly" to consumers via the App Store. Those were the only facts that mattered to the Ninth Circuit as well. *See* Pet. App. 21a ("Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* . . . .").

But antitrust analysis is never that formalistic, let alone simplistic. This Court has been "unable to perceive significant social gain from channeling transactions into one form or another." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.29 (1977); *id.* at 58-59 (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), because of its excessive reliance on form). It has preferred instead to focus on "actual market realities." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992). And of course, the market realities that matter are those germane to the legal issue presented, in this case about *Illinois Brick*. Formalistic distinctions unrelated to the issue presented are the least important things of all.

From that perspective—considering Respondents' theory of antitrust injury and what it implies for *Illinois Brick*—the "actual market realities" that

matter are that consumers do not purchase the allegedly monopolized service from Apple, only developers do; and while consumers do purchase *apps* from Apple (acting as the developers' sales agent) app prices are set *by developers alone*.

App stores "are basically platforms connecting app users (smartphone owners) and app developers."[14] They are "two-sided" platforms, where a platform operator, such as Apple, "offers different products or services to two different groups who both depend on the platform to intermediate between them." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018). It is useful to return to the graphic introduced earlier so that all of the direct relationships are clear:


iOS Developers
Apple, as a principal, sells its own distribution services
The App Store
Apple, as an agent, sells apps at developer-set prices
End Users

[14] Néstor Duch-Brown, The Competitive Landscape of Online Platforms 14, European Comm'n, Joint Research Centre Digital Economy Working Paper (2017), https://ec.europa.eu/jrc/sites/jrcsh/files/jrc106299.pdf.

Respondents are in the Consumer Tier, the end-user side of the platform. Apple does various things that benefit consumers directly, for example hosting the App Store, maintaining account files, and processing and fulfilling app purchases. But in this case, the alleged anticompetitive activity is *on the other side of the platform*, in connection with Apple's role as a provider of *distribution services* to iOS developers (the red arrow above). Apple is accused of scheming "to control and derive supracompetitive profits from the distribution of iPhone apps worldwide" and of "corner[ing] 100% of the worldwide distribution market for iPhone applications." Pet. App. 41a (¶ 3). The 30% commission "for any non-free app sold in the App Store" is allegedly the fruit of Apple's monopolization. *Id.* at 51a-52a (¶ 40).

The relevant question, then, is who purchases distribution services, the allegedly monopolized service; not who purchases apps. Developers are the ones who purchase distribution, not consumers. The commission structure that Respondents challenge is established by contracts between Apple and developers, in which (Respondents allege) the developers "g[i]ve Apple the exclusive worldwide right to distribute those apps thro gh the Apple's App Store," BIO 4, and agree to pay Apple 30% of their sales proceeds. Pet. App. 52a (¶ 41).[15] Therefore,

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[15] In the operative complaint, Respondents get a number of details about Apple's policies wrong. For example, Respondents ascribe the developers' obligations to the "software development kit" that Apple released in March 2008. Pet. App. 51a (¶ 38). The obligations were in fact contained in the then-named iPhone Developer Program License Agreement (copies of which are widely available on the internet), and are now found in the Apple

while this Court's *Illinois Brick* doctrine is about much more than formalism, if one is looking, formalistically, to identify the "direct purchaser" of the monopolized service, it is without a doubt the developer. The developer is also the first person to bear the alleged overcharge on the allegedly monopolized service, and by that definition also the "direct purchaser." *See* U.S. Invitation Br. 18 ("In *Illinois Brick* and *UtiliCorp*, the Court used the term 'direct purchaser' to describe a party that bears an antitrust violator's unlawful overcharge in the first instance . . . .").

Of course, consumers also transact with the App Store: on the consumer-facing side of the platform, Apple acts as the developers' selling agent, as is typical in electronic commerce.[16] This makes Apple a "seller" in the same transactional sense that a travel agent "sells" airline tickets (for airlines). But that is not the end of the *Illinois Brick* analysis. One needs to go on and ask the exact questions the district court asked here: who is setting the price, and what does that mean for the plaintiffs' damages theory? Otherwise one hasn't even started the *Illinois Brick* analysis, which is about pricing, not logistics. And that is especially important in the case of an agency-

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Developer Program License Agreement. These errors do not materially affect the *Illinois Brick* issues. For present purposes Apple accepts Respondents' contentions that "Apple contracted with app developers, who agreed . . . to supply their [iPhone-specific] apps only to Apple for distribution solely through the App Store." BIO 4.

[16] *See* Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, 62 Mgmt. Sci. 2259, 2259-60, 2275 (2016).

based platform like the App Store, since the "key distinction between the reselling and agency selling formats" is that "in agency selling the retail prices are decided by the manufacturer, whereas in reselling they are decided by the e-tailer." Abhishek et al., 62 Mgmt. Sci. at 2259-60.[17] This means that while consumers such as Respondents may be *dealing* with Apple, they are buying apps at prices set solely by iOS developers. That is what matters to *Illinois Brick*.

The Eighth Circuit understood this in *Campos*, a monopolization case arising in the ticketing industry. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1168-71 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). Buyers of concert tickets sued Ticketmaster for allegedly monopolizing the market for ticket distribution services for large-scale popular music events. *Id.* at 1168-69. The ticket buyers sought to recover damages based on allegedly supracompetitive ticket service fees they paid "directly to Ticketmaster." *Id.* at 1171. The allegedly monopolized services, however, were purchased by concert venues, not plaintiffs. *Id.* Ticketmaster was transacting business with the plaintiffs because (having allegedly vanquished its rivals) it had entered

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[17] Indeed, if anything, the presence of a sales agent like Apple ought to be a red flag, since in the law generally sales agents "do not purchase or take possession of the manufacturers' goods, bear any financial risk for these goods, or possess any discretion as to the pricing of the goods." *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1028 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). This Court has previously recognized that sales agents and their principals are not independent economic actors when it comes to pricing. *See United States v. Gen. Elec. Co.*, 272 U.S. 476, 482 (1926) (patent holder did not fix prices with its sales agents, who by contract were "not to control or attempt to control prices" at which the patented goods were sold).

into venue agreements whereby the venues granted to Ticketmaster a right "to sell [tickets] *as Principal's agent*." U.S. & FTC Br. 9, *Campos v. Ticketmaster Corp.*, 525 U.S. 1102 (1999) (No. 98-127), https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0127.ami.pet.inv.pdf ("*Campos* U.S. & FTC Br.") (alteration in original) (citation omitted).

The ticket buyers argued they were direct purchasers, literally and for purposes of *Illinois Brick*. The Eighth Circuit, however, held that because the allegedly excessive ticketing fees were a product of and reflected Ticketmaster's upstream monopoly power over concert venues—the only purchasers of the monopolized service—the directly injured parties were the venues rather than the consumers. Ticket buyers were indirect purchasers because, while they may indeed have paid "some portion of the monopoly overcharge," they did so "only because the previous purchaser [*i.e.*, the venue] was unable to avoid that overcharge." *Campos*, 140 F.3d at 1170.

When asked by this Court for its views, the United States opined that the Eighth Circuit's holding was correct:

> [T]he facts that Ticketmaster collects the money from the ticket buyer, and that part of the total sum that the ticket buyer pays to Ticketmaster is denominated as a service fee, do not alone establish that the ticket buyer is purchasing any service directly from Ticketmaster. To the contrary, according to the express allegations of the complaint, Ticketmaster acts as the venue's agent when it sells tickets. And

> the designated service charge that Ticketmaster collects does not represent its compensation, which is fixed by contract with the venue, usually at a different amount.
>
> It would be contrary to the rationale of *Illinois Brick* to allow ticket buyers to recover damages attributable to Ticketmaster's alleged monopoly overcharges merely because of the particular nature of the input that Ticketmaster supplies to the venues (*i.e.*, Ticketmaster's services as the venues' agent in dealing with ticket buyers).

Campos U.S. & FTC Br. 11-12 (citations omitted).

Of course, the Ninth Circuit disagreed with *Campos*—but not for any reason found in this Court's decisions. It regarded the fact that developers set their own app prices as one of the things that "make[] no difference." Pet. App. 20a. But pricing and the complexity and uncertainty of estimating how pricing decisions pass through overcharges make all the difference in an *Illinois Brick* analysis. So if one wishes to ground an *Illinois Brick* analysis, appropriately, in exactly who is selling what to whom and who is deciding whether to pass-through an overcharge to the plaintiffs, the "actual market realities" that matter to this case—a case about allegedly monopolized *app distribution services*—are clear: Apple sells app distribution services to developers; developers set app prices, passing through some indeterminate amount of Apple's commission. In that setting, consumer app

purchasers could only seek damages based on a pass-through theory of harm barred by *Illinois Brick*.

III. THE NINTH CIRCUIT'S FOCUS ON THE "FUNCTION" OF DISTRIBUTION IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND UNWORKABLE

We turn finally to the Ninth Circuit's "functional" reinterpretation of the *Illinois Brick* doctrine—mindful that at the certiorari stage, Respondents made no effort to defend it. To the contrary, they claimed "the Ninth Circuit did not say or imply that its standing analysis began and ended with whether Apple functioned as a distributor." BIO 7. But that is exactly what the Ninth Circuit held, emphasizing the point by systematically holding that nothing else mattered. *See* Pet App. 17a. ("[T]he question is whether Apple is a manufacturer or producer, or whether it is a distributor .... [I]f Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing."); *id.* at 19a-21a (arguing that "[t]he key to the analysis is the function Apple serves," and dismissing the significance of other factors). This is wrong. In an *Illinois Brick* analysis, there is no reason to even ask who performs distribution "functions" like delivering goods.

As we have shown, the rationale of this Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* is to ensure that courts and juries hearing federal antitrust cases never need to adjudicate pass-through issues, and to avoid the risk that conflicting apportionment arguments lead to duplicative recoveries. The Ninth Circuit's novel reformulation of the law substitutes "functions" that do not matter at all for everything that this Court has held matters most.

The contrast is stark. Under the Ninth Circuit's new rule, so long as a defendant "functions" as a "distributor" of goods to a plaintiff, that plaintiff is a "direct purchaser" from the defendant with standing to seek damages. The analysis is complete, and it does not matter (i) whether "Apple does [or does] not take ownership of the apps," (ii) whether Apple "mark[s]up" the price of apps or takes a "commission," or (iii) "who determines the ultimate price paid by the buyer of an iPhone app." Pet. App. 20a-21a. But these are exactly the considerations that bear on whether the plaintiff's theory of harm would require the trier of fact to resolve pass-through issues. They are the questions (or some of them) that bear on *how sellers set prices*, which is the "function" one needs to examine to determine whether earlier overcharges are being passed-through to later buyers. It is the uncertainty about what pricing decision the seller will make when faced with the higher costs due to the original overcharge that has consistently driven this Court's decisions. *See Hanover Shoe*, 392 U.S. at 493 (referring to "the nearly insuperable difficulty of demonstrating that the [middleman] could not or would not have raised his prices absent the overcharge"); *Illinois Brick*, 431 U.S. at 731-32 ("The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world . . . .'" (citation omitted)); *UtiliCorp*, 497 U.S. at 208-210 (refusing to create an exception for regulated rates due to uncertainties of pass-through). That uncertainty is also the foundation for this Court's concerns about duplicative recovery, since different plaintiffs will predictably "assert conflicting claims" that in the aggregate

exceed true single damages. *Illinois Brick*, 431 U.S. at 737.

Distribution "functions" such as processing orders and delivering goods have nothing to do with these concerns, especially when the distributor is an agent without any price-setting role. In *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006), the Third Circuit correctly stated that who delivers goods to whom "does not affect the economic substance of the transaction."[18] Prior to this case, the Ninth Circuit itself had correctly ruled that consumer claims about allegedly elevated "interchange fees" were barred by *Illinois Brick*, even though the defendant ATM owners distribute money directly to consumers. *ATM Fee*, 686 F.3d at 749-50.[19]

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[18] In *Dentsply*, various groups of dental labs sued a manufacturer of artificial teeth (Dentsply) for monopolization, even though Dentsply sells its product first to middle-man dealers, which then add a markup and resell the teeth to dental labs. 424 F.3d at 366. One group of labs argued that at least when Dentsply drop-shipped the teeth straight to the labs, the labs "were direct purchasers not subject to *Illinois Brick*." *Id.* at 372. The Third Circuit disagreed. *Id.* at 372-73.

[19] In *ATM Fee*, ATM cardholders complained that ATM owners and the banks that issued their ATM cards "engaged in horizontal price fixing," colluding to set a fee (the "interchange fee") that the card-issuing bank paid to the ATM owner. 686 F.3d at 745-46. The plaintiffs alleged that the card-issuing bank passed on that supra-competitive interchange fee when it charged another fee (the "foreign ATM fee") to cardholders when they used an ATM owned by another bank. *Id.* at 746. The Ninth Circuit held that plaintiffs have antitrust standing only if they are complaining about collusion that "sets the price directly paid, not a price latter [sic] passed-on as part of the price at issue." *Id.* at 752-53. "[I]n the context of *Illinois Brick*, fixing an

And the leading antitrust treatise urges antitrust courts to focus on economic substance rather than distribution, explaining: "When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects." 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007).

The Ninth Circuit tried to justify its "functional" approach by pattern-matching this case to others in which "distributors" were held to be direct purchasers from "manufacturers," and end consumers were held to be direct purchasers from distributors or retailers. Of course those are common fact patterns; distributors that buy and resell goods often set prices, after all. The Ninth Circuit has nevertheless confused the legal standard with the particular factual setting to which this Court had occasion to apply that standard. There is not a word in *Hanover Shoe*, *Illinois Brick*, or *UtiliCorp* suggesting that this Court thought that the right way to approach an *Illinois Brick* issue is to force the facts into a manufacturer-distributor dichotomy. The focus on pass-through dynamics and the potential for duplicative recovery, on the other hand, is pervasive.

Finally, the Ninth Circuit's "distributor function" rule will consistently result in the wrong answer when the distributor is an agent rather than a price-setting reseller. The Ninth Circuit acknowledged that "[i]n the case before us, the price [of an App] is

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upstream cost [does] not equate to fixing the price paid by the plaintiffs." *Id.* at 754.

determined as a practical matter by the app developer." Pet. App. 21a. So there is no doubt that it meant to hold that distributor "functions" eclipse price-setting in resolving *Illinois Brick* issues concerning agents. Yet agency sales models the same as, or similar to, the App Store are increasingly prevalent in online ecommerce and facilitate many hundreds of billions of dollars in transactions annually. A few notable examples of this model are Google's Play (originally "Android") marketplace, Ticketmaster's and StubHub's ticket sites, eBay's hugely popular auction site, Sears Marketplace, Facebook's Marketplace, and travel-related sites generally. The sponsor of every one of these marketplaces performs numerous distributor "functions." StubHub sells and delivers tickets—as the agent of its customer (the ticket seller). Google will sell and deliver a copy of Angry Birds™—as the agent of the developer. Sears Marketplace sells and delivers all sorts of goods—as the agent of thousands of third parties.

Under the Ninth Circuit's decision, the distributor functions allow consumers to claim direct purchaser status, always—even for practices that in the first instance affect developers, content owners, or other upstream entities. All of the considerations that are critical under *Illinois Brick* and the direct purchaser doctrine—pricing dynamics; pass-through dynamics; and even a clear potential for duplicative lawsuits and double-recovery—are irrelevant. And this categorical error—getting an entire business model wrong—will not be the sole error caused by the Ninth Circuit's aberrant reasoning. If this Court adds "distributor fu ctions" to its traditional *Illinois Brick* criteria, there is no telling how many cases presenting serious

pass-through and duplicative recovery concerns would survive motions to dismiss and lead to the quagmire this Court sought to avoid.

The Ninth Circuit's decision throws into disarray principles that have long been settled, nationwide. Its "distributor function" analysis should be rejected as unwise and inconsistent with the pass-through and duplicative recovery rationales so clearly evident in this Court's decisions. The district court got this case right—asking the right questions, clarifying the right facts, and coming to the right conclusion. Respondents' damages claims necessarily depend on a pass-through theory of one kind or another, and undoubtedly duplicate and conflict with potential developer claims. They are barred by *Illinois Brick*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 10, 2018